Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-27

INTERNATIONAL BROTHERHOOD OF BOILER-MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS and HELPERS, LOCAL LODGE NO. 358. AFL-CIO,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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[redacted]

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vs.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the Administrative Law Judge, issued January 30, 1976, the National Labor Relations Board's Decision and Order issued November 5, 1976 and the Opinion of the United States Court of Appeals for the District of Columbia Circuit are all set forth in the Appendix attached hereto.

JURISDICTION

The jurisdiction of the Court to review this case upon petition for a writ of certiorari is set forth in 28 U.S.C. §1254 which is due for filing within 90 days of April 5, 1978, the date of the Decision and Order of the U.S. Circuit Court for the District of Columbia Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Was the discharge of Harvey Krieg, the President of the Boilermakers, by the American Ship Building Company an unfair labor practice in violation of Section 8(a) (5), (3) and (1) of the National Labor Relations Act, 29 U.S.C. 158 (1), (3) and (5)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) 29 U.S.C. §158 (a)(1):

"to interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section 7[29 U.S.C.S. §157].

(2) 29 U.S.C. §158 (a)(3):

"by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [29 U.S.C.S. §§151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 U.S.C.S.

§159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) [29U.S.C.S. §159(e)] within one year preceeding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure

of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) 29 U.S.C. §158(a)(5):

"to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C.S. §159(a)].

STATEMENT OF THE CASE

The petitioner, Local Union 358, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO (sometimes referred to herein as "Local 358, Boilermakers", or "Boilermakers Union", or "Boilermakers"), is an unincorporated labor organization and is a local union affiliated with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO.

The American Ship Building Company ("Amship" hereinafter), is a New Jersey corporation in the business of building ships with a shipyard located in Lorain, Ohio. It was in the Lorain, Ohio shipyard where the events giving rise to the unfair labor practices charged below by the Boilermakers Union arose.

The Court has denied Amship permission to intervene herein for the reason that its right to intervene was not timely exercised pursuant to the requirements of the Federal Rules of Appellate Procedure. Accordingly, it is not a party to this appeal.

The original proceedings herein were instituted by the Regional Director of Region 8 of the National Labor Relations Board ("NLRB" hereinafter) on May 30, 1975 and by the Acting Regional Director on June 12, 1975, alleging that Amship had violated Section 8(a)(1), (3) and (5) [29 U.S.C. §§158(a)(1), (3) and (5)] of the Labor Management Relations Act, as amended ("The Act" hereinafter).

These matters came before the Administrative Law Judge as a result of consolidated complaints issued by the Regional Director for Region 8 in Cases Nos. 8-CA-9126, 8-CA-8675, 8-CA-8676, 8-CA-8693, 8-CA-8740 and 8-CA-8872. They were heard by Administrative Law Judge Elmira Abbot Stevenson in a Hearing Room located in the Lorain, Ohio, City Hall, October 14-17, 21-23, 1975.

Respecting the issues which are herein presented the Administrative Law Judge, by decision dated January 30, 1976, found that the discharge of Harvey Krieg constituted a violation of Sections 8(a)(5) and (1) of the Act, but did not constitute a violation of Section 8(a)(3) of the Act.

Disposing of the Regional Director's administrative appeal from the Administrative Law Judge' findings in an unusual Decision and Order dated November 5, 1976, the NLRB, speaking through a panel comprised of Chairman Betty

Southard Murphy, Member Howard Jenkins, Jr. and Member Peter D. Walther, pursuant to Section 10 (c) of the National Labor Relations Act, as amended reversed the conclusion of the Administrative Law Judge respecting the discharge of Harvey Krieg.

The NLRB in ruling on the discharge of Harvey Krieg, did not agree with the administrative Law Judge that Krieg's non-work for two years with full knowledge of the employer rose to the level of an existing working condition established through custom and practice which could not be changed without bargaining with the Boilermakers.

ARGUMENT

The Court of Appeals erred by holding that the discharge of Harvey Krieg, the President of the Boilermakers, by the American Ship Building Company was not an unfair labor practice in violation of Section 8(a)(5), (3) and (1) of the Act.

THE STEINBRENNER THREAT

George M. Steinbrenner III, the Chairman of the Board of Amship, set the stage for the discharge of Harvey Krieg, when, at two meetings of union leaders at Amship's Lorain yard, called and conducted by Steinbrenner in 1973, Steinbrenner requested the leaders of the several unions to agree to Company ordered crossing of craft jurisdictional lines. Harvey Krieg took prompt and pointed exception to this suggestion, stating to Steinbrenner that if he wanted "flexibility", at least as to the Boilermakers, he'd have to negotiate it. The Boilermakers, the largest union at the Lorain yard of Amship, obviously stood to lose the most by Company ordered "job flexibility".

The Steinbrenner statement, announced at the end of the second such meeting, viz.:

"Those that cooperate with me, I cooperate with one hundred per cent and those that

don't I take care of." (R.50-51).

came swiftly on the heels of Krieg's objection on behalf of the Boilermakers.

From the standpoint of labor relations and the mandate of the National Labor Relations Act, this statement contained two interesting facets to it.

It contained a promise and a threat, either one of which, standing alone, constitute a violation of the Act. In the context of the facts of this case, the combined effect of both ends of this statement ought especially to be condemned.

The promise can only fairly be construed to have been directed at those union leaders present at the meetings whose membership stood to benefit by the Steinbrenner suggestion of "job flexibility". Obviously, the threat was directed towards the leader and membership of the largest union represented at Amship's Lorain yard, viz.: Harvey Krieg and the Boilermakers.

Both the promise and the threat related to an area of protected activity under Section 7 of the Act.*

This incident must be considered together with one which occurred on October 11, 1974, the summary discharge of Harvey Krieg, in order to determine the answer to the ultimate question:

> Was Harvey Krieg discharged for insubordination as Amship claims or for his vigorous and effective representation of the Boilermakers, as the petitioner claims?

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*/ The Collective Bargaining Agreement then in effect, sepcifically Article 23 entitled "Jurisdictional Controversies" made the question of disputes regarding craft jurisdictional lines the exclusive province of the unions (Amship Exh. 1).

It is respectfully submitted to this Court that not only is there no substantial evidence* in the record supporting the NLRB's conclusion that Krieg was properly discharged for insubordination but, indeed, there is no evidence whatsoever supporting that conclusion. On the contrary, the only evidence in record supports a conclusion that Krieg was engaged in union activities, protected under Section 7 of the Act when he was dis-

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*/ The review and enforcement of NLRB decisions are, of course, governed by Rule No. 1(a) of the Federal Rules of Appellate Procedure. The scope of judicial review is limited to determining if the record contains substantial evidence to support the NLRB findings. NLRB v. Ogle Protection Service, Inc., 375 F. 2d 497 (6th Cir. 1967), cert. den. 389 U.S. 843.

charged.*

On this point, the NLRB found P. 3 of its Decision:

> "Moreover, when Krieg was ordered by his foreman to help unload steel from the gondola, he was not engaged in any form of union activity. Rather, he was found sitting in the dispatcher's office reading a newspaper. When Krieg told Foreman Van Horn that he wanted to see Van Horn about a grievance, Van Horn told him that he could process the grievance later, but first he must help with the unloading of the steel..."

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*/ At no time during their conversation with Krieg on October 11, 1974, did either Schermond or Van Horn warn Krieg that he would be discharged or even disciplined if he did not report to work (Tr. 82, 331,895).

To conclude that Krieg, while sitting in the dispatcher's office waiting to see Van Horn about a grievance, was not engaged in union activity is akin to saying that a baseball player waiting for his turn at bat in the batter's circle is not playing the game of baseball.

Especially so in view of the record which reveals conclusively that Harvey Krieg was attempting to process a grievance when he was discharged.

Clearly, at the time of the discharge, Krieg was engaged in protected union activity and entitled to a degree of latitude in the handling of grievances. Placing the same limitation on Krieg's conduct as President of the Union as one would apply generally to other workers would severly limit and impede him in his efforts to give full representation to his membership.

In NLRB v. Bowman Transportation, Inc., 314 F. 2d 497 (5th Cir. 1963), the Court of Appeals in a per curiam opinion held:

> "The evidence in this case as presented to us is sufficient to warrant the conclusion of the Board of employee Mann was discharged for asserting a grievance to respondent as to a working condition, while employee Reeves, the union President was discharged for presenting the griveance on behalf of Mann. The conduct of Reeves may have been such as to warrant his discharge but this was not the reason given at the time of his discharge...The right to assert grievances of the type in question here is accorded by §7 of the National Labor Relations Act, and protected by §§8(a)(1) and (3) of the Act. 29 U.S.C.A. §§157, 158 (a) (1) and (3)."

So it was here with Harvey Krieg. He was asserting a grievance and was completely frustrated in that effort by being ordered to work with no consideration given by Amship to the nature or merit of the grievance.

In another discharge case not dissimilar from the instant case, albeit not as flagrant, the Court of Appeals for the Fifth Circuit held that an employee was not insubordinate but rather the employer was guilty of retaliation against a union member.

In NLRB v. Leece-Neville Co., 396 F. 2d 773 (5th Cir. 1968), the employer's claim that the discharge was the result of insubordination rather than as retaliation for union membership was rejected where, following the plant manager's speech opposing the union, an employee walked up to the manager and stated that he was 100 percent for the union, that the union was coming in if he had to bring it in himself.

Moreover, the employee warned the manager not to make threats, during which the employee pounded the manager's desk two or three times and shook his finger in the manager's face.

The instant case, by contrast, involved the Chairman of the Board, Steinbrenner, threatening the President of the largest union at Amship's Lorain yard, Harvey Krieg, for not agreeing to concede to requested "flexibility" as to craft jurisdictional changes deemed appropriate by Amship. Later, on October 11, 1974, Krieg was discharged for attempting to process a grievance. Obviously, this was an area protected under Section 7 of the Act, and could only be changed by collective bargaining.

Indeed, had Krieg consented to the wishes of Chairman Steinbrenner, he may have involved himself in a breach of the duty of fair representation under 29 U.S.C. §158 (b)(1) (A), Mumford v. Glover, 503 F. 2d 878 (5th Cir. 1974).

Thus, in fairly representing the Boilermakers, it was Krieg's duty to inform Steinbrenner that any modification of craft jurisdiction or "flexibility", as Steinbrenner called it, would have to be negotiated.

An employer may not, under cover of its right to select its employees and to discharge them, intimidate or coerce its employees with respect to their "self-organization and representation." NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937). J.&L. was a major case in which the Supreme Court upheld the constitutionality of the National Labor Relations Act. In that case the Court speaking through Mr. Chief Justice Hughes upheld a finding of the NLRB that the Company discharged certain men employed at its Aliquippa plant, including several officers of labor unions, "because of their union activity and for the purpose of discouraging membership in the union." 301 U.S. 1, 29. Mr. Chief Justice Hughes also noted at 301 U.S. 1, 42:

> "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances..." [Emphasis supplies]

While these maxims and lessons were obvious to Mr. Chief Justice Hughes and the Supreme Court of the United States way back in 1937, they appear to have eluded Amship and its representatives at this stage of the 20th century.

Where it has been shown, as it has been conclusively in the instant case, an employee was engaged in protected activity at the time of his discharge, that discharge is unlawful. Southwest Latex Corp. v. NLRB, 426 F. 2d 50 (5th Cir. 1970). Moreover, the existence of a proper reason for a discharge is no defense to an action for improper discharge if such discharge was actually made for an improper purpose. John Klann Moving & Trucking Co. v. NLRB, 411 F. 2d 261 (6th Cir. 1969), cert. den. 396 U. S. 833.

It is also submitted under the facts and surrounding circumstances of Harvey Krieg's discharge that it was motivated at least in part by antiunion animus and that such a circumstances supplies yet another reason for holding it unlawful. See e.g. Ridgley Mfg. Co. v. NLRB, U.S. App. D.C. , 510 F.2d 185 (1975). The fact that there was no warning to Krieg prior to his summary discharge sup-

ports this contention and in itself makes the discharge suspect. NLRB v. Dant, 207 F. 2d 165 (9th Cir. 1953); NLRB v. Glenn Berry Mfgrs. Inc., 422 F. 2d 748 (10th Cir. 1970).

The NLRB below apparently felt it necessary to find, contrary to the finding of the Administrative Law Judge, that Krieg's full-time union activities for two full years "did not rise to the level of an existing work condition" requiring Amship to bargain with him prior to ordering him to perform the work of a rigger, in order to proceed with the conclusion that his refusal to work and subsequent discharge did not violate Section 8(a)(5) and (1) of the Act.

The Boilermakers urge this Court to grant its petition and upon review, reverse the affirmance by the Court of Appeals of the findings of the Board that Krieg's full-time union work for virtually the entire period of time he was President of the Union did not rise to the level of an existing work condition. It sub-

mitted that the record supports and compels such a finding. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); Great Southern Trucking Co. v. NLRB, 127 F. 2d 180 (4th Cir. 1942), cert. den. 317 U.S. 652. But, more importantly, it was not necessary to make such a finding to support the conclusion that the order to work, instead of processing a grievance, was, standing alone, a violation by Amship of Section 8 (a)(1) and (3) of the Act.

Contrary to the belief of Amship's representatives, production does not take priority over an employee's statutory rights. This should especially be the case where the employee is also the President of the Union, who has not only the right but the obligation to pursue the grievance procedure on behalf of his membership.

The fact that there may have been additional time to pursue the grievance under the provisions of the Collective Bargaining Agreement is

not only irrelvant but was not known by Amship's representatives at the time of the discharge incident.

For these reasons, we respectfully urge this honorable Court to reverse the Court of Appeals decision affirming the conclusion of the NLRB that Harvey Krieg's discharge did not violate Section 8(a)(5) and (1) of the Act and to find that his discharge by Amship also violated Section 8(a)(3) of the Act.

CONCLUSION

The Decision and Order of the NLRB entered on November 5, 1976 was for the reasons set forth herein clearly erroneous. On the basis of the record, particularly the facts referred to herein and the applicable law, it is respectfully requested that this Court find that Amship violated Sections 8(a) (1), (3) and (5) of the Act; that Harvey Krieg be reinstated to his former position of employment or a substantially equivalent position; that Amship be ordered to cease and desist

from all Sections 8(a)(1) and (5) conduct found to have occurred and that Harvey Krieg be made whole for any loss of earnings sustained by him by reason of the discrimination against him described herein, together with interest at the rate of six percent per annum, in accordance with the formula set forth in F. W. Woolworth Company, 90 N.L.R.B. 289, and Isis Plumbing and Heating Company, 139 N.L.R.B. 726, and that the costs hereof be taxes against Amship.

Respectfully submitted,

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Attorneys for Petitioner

Dated: July 3, 1978

PROOF OF SERVICE

Three copies each of the foregoing petition and brief were served upon the Solicitor General of the United States, Department of Justice, Washington, D.C. 205 30 and upon Aileen A. Armstrong and Andrew F. Tranovich, attorneys for the Respondent, National Labor Relations Board by delivery to their respective offices personally this 3rd day of July, 1978.

APPENDIX

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1178 SEPTEMBER TERM, 19

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 358, AFL-CIO, Petitioner

v.

National Labor Relations Board, Respondent

United States Court of Appeals for the District of Columbia Circuit
FILED APR. 5 1978

GEORGE A. FISHER
CLERK

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: LUMBAR,* Senior Circuit Judge for the Second Circuit, and McGOWAN and WILKEY, Circuit Judges

O R D E R

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. While the issues presented occasion no need for an opinion,, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing it is

ORDERED AND ADJUDGED by this Court, that the order of the National Labor Relations Board under review herein is hereby affirmed.

Per Curiam
For the Court

/S/ George A. Fisher

George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. §294(d).

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

FILE B B

Exec. Sec. O

MJW

226 NLRB No. 113

D--1733
Lorain, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN SHIP BUILDING COMPANY

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS LOCAL LODGE 358, AFL-CIO	File in Formal File NE	Cases 8--CA--8675, 8--CA--8676, 8--CA--8693, 8--CA--8740, 8--CA--8872, and 8--CA--9126

DECISION AND ORDER

On January 30, 1976, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondents and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the

National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order as modified herein.[1/]

We do not agree with the Administrative Law Judge that Respondent's discharge of Harvey Krieg and the subsequent denial to Krieg of access to Respondent's yard are violations of Section 8(a) and (1) of the Act.

As set forth by the Administrative Law Judge, Krieg was employed by Respondent as a rigger in its shipyard from 1964 until his discharge on October

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1/ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

11, 1974. In July 1974, Krieg began serving as president of the Union. Like his predecessors, who spent an average of 1 to 4 hours a day on union business and the rest of the time working, Krieg began his term dividing his workday almost equally between production work and attendance to union business. Also like his predecessors, he reported to his foreman in the morning at the start of his workday. As time passed, however, Krieg spent less time working. For 2 years prior to his discharge, Krieg did no production work, spending all his time on union business while receiving full pay from Respondent. He also ceased reporting to his foreman.

The Administrative Law Judge concluded that Krieg's nonwork for 2 years with full knowledge of the Employer rose to the level of an existing working condition, established through custom and practice, which could not be changed without bargaining with the Union. By this logic, Respondent

would have had to bargain with the Union for Krieg's services before ordering him to perform work for which he was being paid and before discharging him for failure to obey such an order.

We disagree. No provision in Respondent's collective-bargaining contract with the Union exempted Krieg from performing any but union work. It is true that for the 2 year preceding his discharge Krieg had spent all his worktime on union business. However, there is no evidence that during this period he had ever been directed and refused to work when his services as an employee were needed or that Respondent had anticipated that he would do so. Something more affirmative is needed to establish that an employer has waived its right to require an employee to perform work for which he was hired and for which he was nominally being paid. That Respondent did not intend such a waiver is evidenced by the fact that 4 months before his discharge Krieg was ordered by Foreman Van Horn and

Hull Superintendent Young to resume reporting to his foreman every morning. Krieg filed a grievance but did not follow up on the matter. He simply ignored the order to report. Krieg was therefore on notice well before his discharge that he was expected to work when ordered to do so.

Moreover, when Krieg was ordered by his foreman to help unload steel from the gondola, he was not engaged in any form of union activity. Rather, he was found sitting in the dispatcher's office reading a newspaper. When Krieg told Foreman Van Horn that he wanted to see Van Horn about a grievance, Van Horn told him that he could process the grievance later, but first he must help with the unloading of the steel. There was no need for the immediate processing of the grievance since the subject matter had occurred several days earlier and under the contract the Union had 7 more days in which to press the grievance. Krieg refused the work assignment saying that he was involved in the grievance procedure and was going to continue in

its pursuit. Van Horn thereupon escorted Krieg to the yard manager's office where they met Vice Present of Operations Schermond, who told Krieg to do what Van Horn had ordered him to do. When Krieg refused and walked out, Schermond ordered his discharge.

It is clear, as found by the Administrative Law Judge, that Krieg was not discharged for discriminatory reasons in violation of Section 3(a) (3). It is also clear that the collective-bargaining contract contained no provision which excepted Krieg from performing unit work. Further, we find, that there existed no oral understanding which rose to the level of an existing working condition that Krieg was to do only union

work. 2/ Under these circumstances, we find, contrary to the Administrative Law Judge, that Respondent was not required to bargain with Krieg before ordering him to perform the work of a rigger, which was his job classification and for which he

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2/ Member Jenkins, in agreement with the rationale of his colleagues, notes additionally, that normally "tolerated inefficiencies do not, by a relatively brief and unrecognized existence within an enterprise, thereby become 'terms or conditions of employment.'" (See his dissent in Dixie Ohio Express Company, 167 NLRB 573, 576-577 (1967), enforcement denied 409 F.2d 10 (C.A. 6, 1969).) Here Respondent tolerated Krieg's total involvement in union affairs during the course of the workday for 2 years. However, the custom and practice in existence for some 20 years prior to Krieg's ascendancy to the presidency was for employee union presidents to spend only half their day on union affairs and the other half working. Krieg's encroachment upon this deeply rooted practice cannot eliminate what had existed for 20 years.

was paid. As Krieg refused a lawful order to perform work, we find that his discharge did not violate Section 8(a)(5) and (1) of the Act. 3/

The cases relied on by the Administrative Law Judge to support her conclusion are not apposite. In Howmet Corporation, Austenal Micrecast Division, 197 NLRB 471 (1972), an 8(a)(5) violation was found where the company substantially increased its subcontracting without first giving notice to, or bargaining with, the union. In Granite City Steel Company, 167 NLRB 310 (1967) an 8(a)(5) violation was found where a company, without first bargaining with the union, limited a union business agent's access to its blast furnace from what it had previously permitted. In Motoresearch Company and Kems Corporation, 138 NLRB 1490 (1962), and in Bethlehem Steel Company (Shipbuilding Division), 136 NLRB 1500 (1962), remanded 320 F.2d 615 (C. A. 3,

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3/ Hoyt Motor Company, Inc. 136 NLRB 1042 (1962).

1963), 8(a)(5) violations were found where the companies made unilateral changes in their grievance procedures. In none of these cases was an 8(a)(5) violation found for failure to bargain with a union before ordering an employee who was also a union representative to do needed work within his job classification. If Krieg believed that as union president he was not required by custom or practice to perform rigger's work, the procedure which he should have followed was to obey Van Horn's order and then process a grievance through the grievance-arbitration provision of the collective-bargaining contract.

The Administrative Law Judge further found that Respondent also violated Section 8(a)(5) when it attempted to deny Krieg access to the yard on three occasions because it "was a direct outgrowth of the unlawful unilateral conduct which resulted in his discharge." As we find the conduct resulting in the discharge to have been lawful, we also find that the conduct which was an "outgrowth" thereof was similar-

ly lawful. 4/

Finally, we also agree that Respondent did not violate its bargaining obligation with respect to the movement of the union office. While we agree fully with the rationale discussed by the Administrative Law Judge concerning this issue, we note further that to the extent the office was used by nonemployee "outsiders" Respondent was not even under an obligation to bargain concerning its relocation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

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4/ The Administrative Law Judge found that Krieg was told by guards on three separate occasions that he could not enter the yard without first obtaining permission from a company official, just as any non-employee union representative was required to do. Krieg ignored the warning of the guards and entered the yard to perform Union work. He has since been permitted to enter the yard at will by signing the log book.

tions Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, American Ship Building Company, Lorain, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Delete the words "discharging or" from paragraph 1(a) of the recommended Order.

2. Substitute the following as paragraph 2(a):

"(a) Make whole employees Lonnie Parrett, David Noonan, and Myron Lassen with interest in the manner described in the remedy section of this Decision."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D. C. NOV 5 1976

Betty Southard Murphy, Chairman

Howard Jenkins, Jr. Member

Peter D. Walther Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT unilaterally change the wages, hours, or working conditions of our employee union representatives or stewards established by practice, or threaten to discharge them, or dock or threaten to dock their pay in connection with or as a result of such unilateral changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in their exercise of rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL make Lonnie Parrett, David Noonan and Myron Lassen whole, with interest at 8 percent, for the loss of pay suffered by them as a result of docking the pay of Parrett, Noonan, and Lassen.

WE WILL restore the wages, hours, and working conditions, and other terms and conditions of employment appertaining to the above-named union repre-

sentatives and stewards at the time of the unilateral changes.

WE WILL, upon request, bargain collectively in good faith with the certified joint representative, including International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 358, AFL-CIO, of our employees in the appropriate production and maintenance unit concerning any changes in wages, hours, working conditions, and other terms and conditions of the union representatives and stewards of our employee established by practice.

AMERICAN SHIP BUILDING COMPANY
(Employer)

Dated_____ By:_____
Representative (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

D--1733

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, Suite 1695, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3739.

JD-19-76
Lorain, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN SHIP BUILDING COMPANY

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 358, AFL-CIO	Cases 8-CA-8675 8-CA-8676 8-CA-8693 8-CA-8740 8-CA-8872 8-CA-9126

Paul C. Lund, Esq., for the General Counsel
Timothy R. Sweeney, Esq., (Zellmer & Gruber), of Cleveland, OH, for the Charging Party.
Anthony J. Garofoli, Esq., (Bartunek, Bennett & Garofoli), of Cleveland, OH, for the Respondent

DECISION

Statement of the Case

ALMIRA ABBOT STEVENSON, Administrative Law Judge: A hearing was conducted in this consolidated proceeding at Lorain, Ohio, October 14-17, 21-23, 1975. Upon charges duly filed by the Charging Party Union and served on the Respondent, a complaint was issued in Case 8-CA-9126 May 30, 1975, and an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing upon charges in the remaining cases was issued June 12, 1975. The consolidated complaint

was amended June 18, 1975, amplified by additional particulars June 27, 1975, and further amended at the hearing. Answers to the consolidated complaints were duly filed by Respondent and amended at the hearing.

The first issue in this proceeding is whether or not the Respondent violated Sections 8(a)(5), (3) and (1) of the National Labor Relations Act, as amended, by discharging Union President Harvey Krieg on October 11, 1974; and violated Section 8(a) (5) and (1) by unilaterally and in bad faith restricting him in the performance of his duties as president of the Union in the shipyard after his discharge.

The second issue is whether or not the Respondent violated Sections 8(a) (5), (3) and (1) by unilaterally and in bad faith docking the pay of the following employees for time spent on Union business during working time: Union Vice President Bert Mucha, 53 specific occasions between November 7, 1974, and June 8, 1975; Burner Steward, Lonnie Parrett,

January 17 and April 2, 1975; Welder Steward David Noonan, January 22 and February 5, 1975; and alternate Welder Steward Myron Lassen, January 17, 1975. Closely related is the issue of whether or not the Respondent violated Section 8(a)(5) and (1) by unilaterally and in bad faith threatening and harassing these Union representatives and stewards in the performance of their duties.

The remaining issue is whether or not the Respondent violated Section 8(a) (5) and (1) by unilaterally and in bad faith (1) relocating the office allocated to the unions on the Respondent's premises, removing the telephone from and changing the locks on that office; (2) insisting on using a dictaphone in third-step grievance meetings; and (3) determining in advance the Respondent's answers to grievances before discussing them at the third-step meeting on April 23, 1975.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General

Counsel and the Respondent, I make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

The Respondent is a New Jersey corporation with its principal office located in Lorain, Ohio, where it operates the shipyard involved in this proceeding in the building, repairing, and servicing of ships. The Respondent annually receives goods valued in excess of $50,000. from points located outside Ohio. The Respondent admits, and I conclude, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Labor Organizations

The record shows and I find that the Charging Party, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 358, AFL-CIO, herein referred to as the Union, is a labor organization within the meaning

of Section 2(5) of the Act. 1/

III. The Unfair Labor Practices 2/

A. Introduction

The following persons were admitted supervisors and agents of the Respondent at pertinent times:

Robert L. Dibble - Vice President of Personnel
Rodger Knight -Welding Foreman Assistant
Joseph D. O'Keefe - Manager of Industrial Relations
Carl Plott - Yard Superintendent
John Schermond - Vice President of Operations
Robert E. Smith - Assistant Hull Superintendent
John C. Stuller - Welding Foreman
William A. Van Honr - Rigging Foreman

The parties stipulated that Jerry Przystulsky, Robert Saunders, Robert Rouse, Ted Almas, and Norman Shroeder were also supervisors. Paul Tietjen was president

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1/ The complaint alleges, the Respondent admits, and I find that the following unions, affiliated with AFL-CIO, are also labor organizations within the meaning of Section 2(5) of the Act: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Electrical Workers;

of the Respondent, and Harold Young was superintendent of the Lorain shipyard. 3/

1/ (Continued) Brotherhood of Painters and Allied Trades; International Brotherhood of Firemen and Oilers; International Union of Operating Engineers.

2/ The factual findings rest on my best judgment as to what happened in light of the relative credibility of witnesses and the probabilities when viewed in the context of the entire record. None of the major witnesses was wholly believable and none is totally relied on. Although considerations relevant to specific factual findings are pointed out in certain instances, a few relative assessments merit comment. I find Director of Security and Safety Roy Walker, Union Vice President Bert Mucha, and International Representative George Sepelak generally to be the least credible of the major witnesses; Walker because he was revealed to be inaccurate on the one important issue he testified about and Mucha and Sepelak because of their unfavorable demeanor and their inconsistencies, plus in the case of Mucha his obvious attempts at evasion. I rely on the testimony of Union President Krieg with caution because of his tendency to expand, withhold, and color the facts to support his cause. Rigging Foreman William Van Horn, Assistant Hull Superintendent Robert Smith, Industrial Relations Manager, Joseph D. O'Keefe and Vice President John Schermond failed to stick to the truth always but based on demeanor and review of their entire testimony, I am convinced that they succeeded more often than the aforenamed witnesses. The demeanor of Union Stewards David Noonan and Myron Lassen was more favorable, and their testimony withstands analysis better, than that

Since August 29, 1941, the International Unions named above have been the certified joint representative in the appropriate unit of production and maintenance employees at the Respondent's three locations, including the shipyard at Lorain, Ohio, here involved. For many years, the International Unions have been parties to joint collective-bargaining agreements with the Respondent covering the employees in the certified unit, but each International Union or its local represents employees within its own agreed jurisdiction. 4/ The agreement involved in this proceeding was jointly executed, and was effective from August 15, 1972, until August 15, 1975. The Charging Party Union represents by far the largest number of employees at the Lorain shipyard covered by the agreement, including the riggers, welders, and burners.

2/ (Continued) of Union Steward Lonnie Parrett who is credited only where supported by corroboration or the probabilities.

Two articles of the agreement are relevant to this proceeding. Art. 21, which is entitled, "Access to Yards," provides as follows:

> The appropriate Union representative shall have access to the Company's property by securing permission from the Company to obtain information relating to pending grievances and other matters pertaining to the proper application of this agreement.
>
> There will be no collection of dues by the Union on Company time and there will be no other Union activity on Company time or Company property except that necesssry in connection with the handling of grievances and the enforcement of this agreement.

3/ Knight, Plott, Przystulsky, Saunders, Rouse Shroeder, Almas, and Tietjen, did not testify in this proceeding.

4/ Machinists are covered by a separate collective-bargaining agreement with the International Association of Machinists, AFL-CIO.

Article 25, entitled "Machinery for Adjustment of Complaints," provides a three-step grievance procedure culminating in final and binding arbitration. Art. 26 specifies that, "The Union shall have committeemen and/or stewards to handle grievances." The first step is verbal, to be taken up by "The aggrieved employee and/or his committeemen or steward" with the employee's immediate supervisor not more than 10 workdays following the occurrence. If the verbal grievance is not settled within 24 hours, it is to be presented in writing "by the employee, his departmental steward and/or Union representative" within 5 workdays, to the yard manager or his representative. The yard manager or his representative must hold a meeting with the employee, his departmental steward and/or the Union representative within 5 workdays from the date of presentation of the written grievance, and answer it within 3 workdays of the step-two meeting. The third step requires that,

> ...the Yard Committee (to be composed of one (1) designated union representative of each Union signatory to this agreement, one (1) steward from the aggrieved Union, and the grievant or grievants) of the Yard shall take up the alleged grievance with representatives of top management. The International Representative of the Union representing the aggrieved employee may also be present in addition to the Yard Committee. This step of the grievance procedure shall be taken with five (5) work days of the answer of the grievance in the previous step; however, this time limit may be waived...

B. Discharge of Harvey Krieg

The complaint alleges that the discharge of Krieg violated Sections 8(a)(5), (3) and (1) of the Act. The Respondent contends Krieg was lawfully discharged for refusing to work.

Harvey Krieg was hired by the Respondent December 3, 1964, and thereafter qualified as a first-class rigger. He was elected president of Boilermakers'Local 358 in June, and took office in July, 1972. The record shows that it was the practice of those who occupied the office of president of Local 358 for a period of more than 20 years before Krieg to report to their supervisors every morning at the beginning of their shifts. When summoned for union business, they requested, and invariable received, permission from their foreman to leave their jobs for that purpose, occasionally being required to spend a short time finishing the job upon which they were engaged or until a replacement was summoned. Three of Krieg's predecessors testified that permission was always granted, and that they spent on the average of 1 to 4 hours a day on union business during working hours, for which the Respondent paid them.

Krieg began his term as president of the Union reporting every morning to William A. Van Horn, rig-

ging foreman, and working as a rigger about half his 8-hour shift. The other half of his shift he spent conferring with stewards and employees, investigating and "researching"grievances, presenting verbal and written grievances to foreman and management, and attending second and third-step grievance meetings, after he informed Foreman Van Horn that he had to go on "union business". As time went by, Krieg spent less and less time on rigging and more and more time on union business. For a while he continued to report to Van Horn at the beginning of his shift every day, but eventually he ceased to do even that. 5/ Thereafter, Van Horn assigned other riggers to do Krieg's work, and

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5/ Although I do not think it matters, I do not credit Krieg's testimony, which the Respondent's Vice President of personnel, Dibble, denied, that Dibble verbally acquiesced in Krieg's announced refusal to report ot Van Horn any longer.

eventually replaced him. For a period of almost 2 years Krieg spent his entire time on union business, at full pay, without doing any work for the Respondent and without any remonstration by Van Horn or management, except on one occasion. That occasion was June 7, 1974, when after Van Horn complained to his superior, Hull Superintendent Harold Young, they both ordered Krieg to begin reporting again to Van Horn every morning. Krieg, however,filed a grievance against them for harassing him, and ignnred their order to report. There the matter rested, no further action being taken against Krieg.

On discharge day, October 11, 1975, Krieg went to find Foreman Van Horn for the purpose of complaining about the crew loading groceries on a recently built ship, work which Krieg claimed was riggers' work. Discovering that Van Horn was not in his office, Krieg asked the dispatcher where he was, and was informed that Van Horn was aboard the ship. Knowing that the ship had departed earlier

that morning on its trial run and assuming that Van Horn would soon return, Krieg elected to wait for Van Horn in the dispatcher's office. Meanwhile, early that morning Van Horn had assigned two riggers on the trial run of the departing vessel. At 7 a.m. Van Horn assigned his remaining men to other jobs, and then discovered that he had only three riggers available to unload steel from a gondola. As the unavailability of steel had delayed the start of new ship construction and caused substantial layoffs of employees, Van Horn decided to assign Krieg to complete the usual four-man gondola unloading crew complement in order to get the steel in the production process as fast as possible. Looking for Krieg, he returned to his office and then went to the dispatcher's office where he observed Krieg reading the newspaper.

Krieg announced he wished to take up a grievance with VAn Horn regarding the loading of groceries aboard the just-departed vessel. Van Horn old Krieg the grievance could be taken up

later, but first he must help unlaod the steel. Krieg refused the work assignment on grounds that he was "involved in the grievance procedure" and "was going to continue to pursue that." Van Horn thereupon escorted Krieg to the yard manager's office where they encountered Vice President of Operations John Schermond. Van Horn asked Schermond "once and for all" whether Krieg was a rigger first or a union official only. Schermond replied that Krieg was a rigger first. When Van Horn complained that Krieg had refused to work, Schermond ordered him to do what Van Horn told him to do. Krieg protested that he was acting under Article 21 and 25 of the collective-bargaining agreement, but Schermond repeated his order. Krieg turned his back, walked out, and went to the union office. Schermond directed Van Horn to give Krieg a reprimand for insubordination which under Plant Rule 19 called for discharge. Van Horn had the discharge slip prepared and delivered it to

Krieg in the union office. 6/

In my opinion the record fails to support the General Counsel's contention that Krieg's discharge was motivated by anti-union considerations. The record shows that Krieg was an aggressive union president from the start, and that he pushed through many improvements in conditions and benefits and filed and won many grievances. There is no evidence, however, that management built up any hostility towards Krieg or his union because of this. Krieg testified, without contradiction, to the effect that the Respondent's board chairman,

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6/ Where accounts vary as to what happend on October 11, I rely on Van Horn's . Schermond supported Van Horn in much of his testimony but I believe Van Horn's recall of events was better. I also believe that Krieg yielded a little more to the temptation to color events to his own advantage than Van Horn did.

Steinbrunner, told him in 1973, after Krieg took an intractable position regarding work jurisdiction practices, "Those that cooperate with me, I cooperate with one hundred per cent and those that don't, I take care of." This statement was made, if at all, a long time ago in a discussion of an issue, apparently not thereafter pressed by the Company. I do not credit Krieg's testimony that only 3 or 4 days before his discharge Assistant Hull Superintendent Robert Smith charged that Krieg was not "in Mr. STeinbrunner's circle" and "that's why you are having trouble because the guy is after you." The providentiality of such an isolated revelation and the forcefulness of Smith's denial persuade me that it did not happen. Finally, Supervisor Ted Almas may have tipped Krieg to the possibility of an impending work assignment, but there was no hint of anti-union motive in Almas' remark.

The record shows an association between the Company and several unions, including the Charging Party Union, which has existed for many years.

Some of the supervision and management officials involved in this proceeding themselves have backgrounds of union affiliation and advocacy. 7/ Although the association doubtless has undergone periods of strain as it certainly did in late 1974 and early 1975, nevertheless collective-bargaining agreements have been negotiated, entered into, and administered. Grievances have been filed regularly and processed through the grievance procedure to and including arbitration. Other than expressions of disagreement and exasperation normally characteristic of the arms-length bargaining rela-

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7/ Industrial Relations Manager O'Keefe has been President,member of teh negotiating team, and steward of IBEW Local 1844; Assistant Hull Superintendent Robert Smith was welding steward for the Union; Welding Foreman John Stuller has been steward, vice president, and president of the Union, as well as financial secretary and business manager on its payroll.

ship there is no substantial probative evidence of any desire by the Respondent to deprive its employees of representation by the Union or unions of their choice to which they are entitled, or of other anti-union animus.

Van Horn disavowed any doubt that Krieg spent his time during the 2 years preceding his discharge as he said he did, in authentic union activity implementing the collective-bargaining agreement. Van Horn said, however, that he did become frustrated because "I couldn't see why we had to pay him 8 hours a day when he was not doing 1 hour's work for us." In this testimony, I believe, is revealed the motivation for Van Horn's conduct toward Krieg on October 11. He was not particularly interested in forestalling the particular grievance which Krieg tried to present to him, or any other grievance. He only wanted to get some rigger's work out of Krieg. And he went about it by suddenly confronting Krieg with a direct order to work, admittedly for the first time in 2 years. Vice

President Schermond, who made the discharge decision, was, I am convinced, motivated by the same consideration plus a determination to back up his foreman's direct order and not to tolerate an employee's flat refusal to obey it.

Under the law as I understand it, though, Van Horn and Schermond were not entitled to do this. Although the collective-bargaining agreement did not expressly provide that the president of the Union was privileged to spend his full working time, 8 hours a day, on union activities, in implementation of the agreement, it is undisputed that this had been the established practice for almost 2 years during which entire period Krieg did no work for the Respondent, was not asked to do any, and yet was fully compensated for his time. Krieg's status thereby became an existing working condition at the Lorain shipyard, established through custom and practice

which could not be unilaterally changed. 8/

> This is not to say that the statute freezes Respondent to the existing practice....It is to say that prior to effecting changes therein it is under a duty to give its employees' statutory representative an opportunity to bargain concerning proposed changes. The bargaining representative is entitled to "an opportunity to present arguments to the employer to dissuade him from effecting the change, and also an opportunity to propose alternatives or compromises which might moderate the change so as to accomodate the interests of the employees as

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8/ See Howmet Corporation, Austenal Microcrest Division, 197 NLRB 471; Granite City Steel Company, 167 NLRB 310; Motoresearch Company, et al., 138 NLRB 1490; Bethlehem Steel Company (Shipbuilding Division), 136 NLRB 1500, remanded 320 F.2d 615 (C.A. 3).

well as of the employer." 9/ This the Respondent totally failed to do.

Management's abrupt order that Krieg perform rigger's work was tantamount to a unilateral change in an historically established working condition maintained by the parties to the collective-bargaining agreement, regardless of the Respondent's motive in doing so,10/ and its discharge of Krieg for refusing to obey such an unlawful order and thus acquiesce in the Respondent's conduct, which he was entitled to refuse to do, 11/ constituted a violation of Section 8(a)(5) and (1) of the Act.

The General Counsel contends that this conduct also violated Section 8(a)(3) of the Act. I am of the opinion, however, that viewed in the context of all the relevant facts this conduct 12/ was not

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9/ Granite City Steel Company, supra, 316.
10/ See N.L. R.B. v. Katz et al., 369 U.S. 736.
11/ See John Sexton & Co., a Division of Beatrice Foods Co., 217 NLRB No. 12
12/ Cf. American Shipbuilding Co. v. N.L.R.B.,380 U. S. 300, 313.

"so inherently destructive of employee interests that it may be deemed proscribed [by Section 8(a)(3)] without need for proof of an underlying improper motive." 13/

C. Harassment of Harvey Krieg

The complaint alleges that the Respondent further violated Section 8(a)(5) and (1) by harassing and imposing more restrictive rules on Krieg in the performance of his duties as president after his discharge.

After he was discharged, Krieg remained president of the Union. On October 14, 1974, he addressed a letter to Yard Manager Norman Shroeder telling him so. Krieg advised Shroeder that he intended to spend 4 hours a day in the yard and asked permission for access pursuant to Art. 21 of the collective-bargaining agreement for the purpose of performing his duties as president.14/

13/ N.L.R.B. v. Great Dane Trailers, Inc., 388, U. S. 26, 33.
14/ In this letter, Krieg also wrote, "In my

The Respondent's president, Paul Tietjen, responded in a letter dated October 21, 1974, to the following effect:

> Since you are no longer in the employ of American Ship Building Company, you will be extended every courtesy which would be afforded to International Representatives, and/or Business Agents of the Union.
> As a company policy, access to the yard is controlled. Therefore, you are requested to notify Mr. O'Keefe prior to any visitation by yourself, to obtain

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14/ (Continued) absence, I will inform the Company who is to assume the duties as Pres. of Local #358. At no time is any Officer of Local #358 to assume the duties of Pres. of Local #358, unless the Company is so informed by myself." The significance of this statement is discussed below in connection with the alleged unlawful treatment of Union Vice President Mucha.

permission to enter the premises.

Three reports dated November 4, 7, and 8, 1974, made out by guards at the gate show that Krieg was told by a guard on these three occasions that he could not enter the yard, the first time on instructions of Industrial Relations Director Joseph Danny O'Keefe, but that Krieg ignored the guards and drove in anyway. 15/ Krieg did not seek permission from O'Keefe, as instructed by President Tietjan, and he had not at this time received permission from any management official to enter the premises. Subsequently, however, he has been permitted to enter the yard at will by signing the log book at the gate as other outside representatives do. Krieg agreed he had been going in and

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15/ I find that all three witnesses who testified about Krieg's access to the yard after his discharge to be unreliable on this subject. Industrial Relations Manager O'Keefe and Director of Security and Safety Roy Walker's testimony was not consistent with the documentary evidence, and Krieg was uncertain and inconsistent.

out of the yard doing what he wanted to after signing in, for 10 months at the time of the hearing. In view of this testimony, I do not credit his subsequent assertion that he is still told, by someone unnamed, that he can only leave the conference room where second and third-step meetings are held to see a steward or union officer. There has been no change in Boilermakers International Representative Sepelak's access to the yard. 16/

I have found no discriminatory motive in the discharge of Krieg, and I find that the credited facts do not show an intent on the part of the Respondent to harass Krieg. Nor do I find an intent to harass him in the Respondent's docking of Vice President Mucha and the stewards for time spent discussing union matters with him, discussed below.

16/ Sepelak was the Boilermakers international representative who regularly serviced the Respondent's employees, although Philip Bartley (who did not testify) substituted for him occasionally.

However, I find that the attempt to deny Krieg access to the yard on three occasions was a direct outgrowth of the unlawful unilateral conduct which resulted in his discharge, because if he had not been discharged, there would have been no attempt to keep him out of the yard. I therefore conclude that this conduct constituted a further violation of Section 8(a)(5) and (1).

D. Union Vice President Mucha and Stewards

The complaint alleges that the Respondent violated Section 8(a)(5), (3) and (1) by docking the pay of Vice President Mucha, and violated Section 8(a)(5) and (1) by docking the pay, threatening, and harassing Stewards Parrett and Noonan and alternate Steward Lassen.

16/ (Continued) pondent's employees, although Philip Bartley (who did not testify) substituted for him occasionally.

The contract provisions set forth above do not spell out either the amount of time employee-union representatives may spend engaging in union activities on working time or whether they must receive permission from supervision to leave their work for this purpose. 17/ With regard to the practice, the testimony is in agreement that no union officials or stewards were docked in pay or threatened with docking for time spent on union activities before November 7, 1974, approximately 3 weeks after President Krieg was discharged. I find that it was the general practice among union

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17/ I find that the applicability of Art. 21 of the collective-bargaining agreement to employee union representatives was never asserted before Krieg's discharge. I note, however, that Yard Superintendent Carl Plott's answer to a grievance filed by Union Vice President Mucha November 27, 1974, appears to concede its applicability. In any event, Art. 21 does not spell out the matters referred to above or give stewards and union officials carte blanche to determine for themselves when they will leave their work for union business and be paid for it. I also find that Rule 1 of the Company Rules

officials and stewards, except Krieg, to report to their foreman for work every morning, and when they were summoned on union business to inform their foreman they were leaving for that purpose, where they were going, and usually, whom they were going tosee. If the foreman was not present, it was the general practice to tell the lead man or a fellow employee to inform the foreman on his return. I also find that permission to go on union business was seldom if ever denied or postponed.

(1) Vice President Mucha

Bert Mucha is a first-class welder whom Assistant Hull Superintendent in charge of Welding and Burning Robert Smith considers an excellent welder. Mucha was assigned to the pipe shop under the supervision of Foreman Larrimore, who did not testify in this proceeding. Mucha has been vice president of the Union since 1970.

17/ (Continued) and Regulations, providin g progressive discipline for loafing or leaving work

Based on Mucha's own testimony, I find that prior to Union President Krieg's discharge, he spent 50 per cent of his regular worktime on union business and that the Company compensated him for the time so spent. Beginning on October 11, 1974, the time spent by Mucha on union business increased. He testified, albeit reluctantly, that every morning he appeared at Assistant Hull Superintendent Smith's office at 7 a.m., the start of the shift, and asked to go on union business. The record shows that during the 12 workdays from then until the end of October, Mucha welded only 7 hours. Beginning on November 1, 1974, he performed no welding for the Respondent, except on overtime at double pay, until April 7, 1975. 18/ Mucha appeared at a loss to explain this increase in union business. Thus, he testified more than once

17/ (Continued) without permission, is not relevant as it has never been invoked by the Respondent with regard to employee union representatives on union business.

that Krieg's discharge had nothing to do with it. He also said, inconsistently and vaguely, that his duties increase because he was called upon to assume Krieg's duties "up to a point" or "to a certain extent." 19/

18/ Mucha testified that the Union paid him for all the time he spent on union business during working hours for which the Respondent did not pay him. He finally went back to welding, he said, because "our Union was going broke" paying him.

19/ Mucha indicated he was unaware of Krieg's October 14, 1974 letter referred to above to Yard Manager Norman Shroeder which stated, "At no time is any Officer of Local #358 to assume the duties of Pres. of Local #358, unless the Company is so informed by myself." Krieg testified that he never informed the Company in writing that anyone was to assume the duties of Union president. Although Krieg said he told Industrial Relations Manager O'Keefe and Yard Manager Shroeder that Mucha would take his place when he was not in the yard, he conceded he could be incorrect about this. Krieg also said he told Assistant Hull Superintendent Robert Smith many times that Mucha would be acting president when he was away. Smith denied it. Mucha testified that Krieg never instructed him to assume the duties of president. In these circumstances, I find that Krieg never gave such information to any member of management. His and Mucha's suggestion that management should have taken for granted that Mucha would assume his duties because Mucha had acted as president in Krieg's

Even though Krieg came into the yard every day regularly, Mucha said, Krieg spent his time in the union office, at second and third step meetings and talking to Mucha about problems. Mucha had no recollection of the number of employees at various times during the period involved in this case, but he insisted that in any event there was no relationship between the size of the employees complement and the number of grievances filed. He could only say he spent more time on union business because "evidently we had problems in our rank-and-file," and because "with all the problems that were going in the yard,my duties just kept on increasing and increasing all the time... all the time." 20/

19/ (Continued) absence for years and years must be rejected as contrary to the specific instruction in Krieg's letter.

20/ Although Mucha testified, on redirect examination, that he was acting steward of three different departments at one time or another between October 1974 and July 1975, I find

It is clear that there was no discussion between the Union and management of any change in past practice and procedure either before Mucha began to spend more time on union business or before the first time his pay was docked November 7, 1974. Assistant Hull Superintendent Smith credibly testified that shortly after Mucha began spending his entire regular working day on union business, Smith arranged for Mucha to report to him instead of to his regular foreman because Smith learned that Mucha was going from foreman to foreman trying to get permission to go on union business, ending up with Smith anyway. Mucha was a valuable welder and was needed on the job every day, and Smith felt that the only way to get any reasonable control over Mucha was to

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20/ (Continued) this testimony unreliable because he was so vague about the periods covered and about how he received those assignments. In any event, he did not attribute the increase in time spent on union business to these alleged assignments.

have him report directly to Smith. Smith said although he believed that Rule 1 of the Company rules was applicable, he did not wish toapply it to Mucha, as Krieg had been discharged and Smith wanted to avoid further problems. It was Industrial Relations Manager O'Keefe's suggestion as an alternative that Mucha be docked for the time spent on unauthorized union business without permission.

On November 7, 1974, Smith testified Mucha was paid for 6 hours of authorized union business, but docked for 2 hours covering time spent in general discussion with Harvey Krieg, without authorization.

> He was told that the Company would not pay for the time spent by him in advising the president of yard occurrences, when in fact,the president was not here.

> We did not feel this came under the structure of the contract with American Shipbuilding Company and under my responsibilities as Mr. Mucha's supervisor. 21/

Thereafter, Mucha presented Smith with requests to go on union business throughout the day, as many as 11 times in a single day. On occasions when Smith docked Mucha's pay, it was because Mucha refused Smith's order to work and insisted on engaging in union business immediately, without permission, Smith said. Mucha testified

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21/ I credit Smith as to what was siad on this occasion, as it seems more likely than Mucha's version, which was not corroborated by Krieg nor by the grievance filed on the incident, that Smith said, "I have just been informed that if anybody talkes to Harvey Krieg or Harvey Krieg talks to a Union member in the yard, they will be docked."

that on most occasions, Smith told him he would not prevent Mucha's engaging in union business but if Mucha insisted on doing so, at times when no permission was granted, his pay would be docked, and it was. Although Smith testified to reasons for refusing to authorize Company pay in specific instances, he eventually indicated that he had no quarrel with the kind of activity in which Mucha asked to engage on those occasions when he was docked for not having permission. There appears to be no substantial difference between the kind of union activity for which Mucha was paid and the kind for which he was not, except that he was almsot invariably docked for time spent in general discussions with President Krieg, helping stewards write grievances, and "researching Art. 21." 22/

22/ These findings are based on Smith's testimony. Mucha gave no testimony and had no notes or recall, of the union business which was authorized and for which the Company paid him, and did not keep as careful a count as Smith of the time docked. It is unlikely, therefore,

Much of the unauthorized time Mucha spent writing grievances protesting the docking of his own pay. Krieg estimated that 40 such grievances were filed. There is no evidence that any grievance was lost for union failure to meet the contract deadlines.

The Respondent's records show the following with respect to Mucha during the period covered by the complaint. 23/

22/ (Continued) that his testimony as to what he told Smith he was going to do and what he did during the periods for which he was docked is as accurate as Smith's.

23/ Figures do not include absences or vacations. The Respondent's records show that Mucha's pay was docked a total of 17 1/2 hours during the period covered which the General Counsel does not claim. On the other hand, the General Counsel claims 8 hours for March 13 and 1 hour for April 9 which the Respondent denies and is not shown on its records. I find that the Respondent's records are more reliable than Mucha's notes and testimony on which the General Counsel's claims are based. As indicated above, Mucha had no records of payments by the Company for working time spent on union activities, but he conceded that 50 percent would be a conservative figure.

Month 1974	Hours welded on reg. time	Hours on auth. union business, compensated	Hours docked for unauthorized union business 24/
Nov.	9-1/2	126-1/2	6-1/2
Dec.	14	101	7-1/2
1975			
Jan.	0	90	49-1/2
Feb.	0	40	70
Mar.	0	93-1/2	54-1/2
Apr.	66	61	24-1/2
May	53-1/2	26-1/2	2-1/2
June	1/2	36	16
Totals	143-1/2	567-1/2	231
Average	18	71	29

24/ I note that the Respondent subsequently paid Mucha for 1/2 hour docked from his pay November 12, 1974, on the grounds that he had permission from Foreman Przystulsky, although Mucha testified he had never sought permission. He was also paid for 1/2 hour docked November 13, 1974; the record shows that a grievance based on this docking was settled at the second-step meeting by Yard Manager Plott's concession that Art. 21 was applicable to Mucha in exchange for Mucha's agreement to obtain permission for engaging in union business. Mucha's notes indicate he was also reimbursed for 3 hours' pay docked March 31, 1975.

The compalint contains a separate allegation that on April 23, 1975, the Respondent, contrary to past practice, threatened to dock Mucha's pay for 3 hours for time spet at a third-step grievance meeting.

Smith testified Mucha was docked 3 hours "for spending time on a third-step grievance, not authorized by Mr. O'Keefe." O'Keefe, whom I credit, 25/ testified that many burner grievances for "fume pay" for work aborad the vessel Steinbrunner were scheduled to be heard April 23. The committee meeting did not get started ont ime that morning because Boilermakers

25/ Mucha did not testify to what was said on this date, and there is no grievance in evidence relating to it. I do not credit Harvey Krieg's testimony that O'Keefe told Mucha, "He would no longer pay him for attending third-step grievance meetings." as his version is not borne out by events and as I consider O'Keefe and Smith more credible.

International Representative Philip Bartley was late, and all the burner grievants were off the job sitting in the lunchroom waiting to testify at the third-step meeting. When Bartley arrived, it was agreed to hear the burners' grievances that afternoon, sending for them individually. O'Keefe told the Union officials that as Bartley, Krieg and Steward Parrett would be present, there was no need for Bert Mucha to be at the meetings, it was not in the contract. Bartley insisted he wanted Mucha there, and O'Keefe finally said he would not authorize it and would not pay. Mucha attended the meeting but was docked for the time. Although the contract did not provide for the vice president's attendance at third-step meetings, Mucha had frequently done so in the past and been paid for his time.

Mucha was paid for 5 hours' authorized union business April 23.

The General Counsel contends that because in

the past Union representatives did not have to seek permission to leave their work for union business, and because their pay had never been docked for doing so, the Respondent's imposition of a requirement that Mucha obtain permission to go on union business and threatening to dock and docking his pay on April 23 and other specified dates constituted a unilateral change in working conditions violative of Section 8(a)(5). He also contends that Respondent's conduct in this respect was motivated by a desire to curtail union activities in the yard, and was therefore violative of Section 8(a)(3).

As found above, consideration of the entire record in this case does not reveal that the Respondent's conduct was motivated by discriminatory or anti-union considerations. Based on the credited testimony of Robert Smith and Danny O'Keefe and the absence of any probative evidence to the contrary, I find that these management officials were motivated in their treatment

of Mucha, solely by trying to obtain productive work from him. 26/

26/ There is no evidence that management was aware the Union was compensating Mucha for time spent on union business when the Company refused to pay before March 4, 1975, when Krieg told O'Keefe about it. I do not credit the testimony of Harvey Krieg that O'Keefe told him, the day before a 5-day wildcat strike began February 19, 1975, that O'Keefe intended to put Mucha on leave of absence or layoff. O'Keefe flatly denied this. Mucha suggested that this was a rumor spread by foremen and management, and he and Union Attorney Timothy Sweeney indicated the rumor was a factor behind the strike. Sweeney investigated the matter and concluded it was an unfounded rumor. I do not believe that the rumor was spread by foremen or management. See N.L.R.B. v. Consolidated Diesel Electric Company, Division of Condec Corporation, 469 F.2d 1016 (C.A. 4).

It is my opinion that it was the Union, as represented by its vice president, Mucha, which attempted unilaterally to change working conditions, and not the Respondent. The established practice, which could not be changed unilaterally, was that Mucha was permitted to spend 50 percent of his working time on union business at full pay. I believe the issue of whether or not he, and other union representatives, were required to obtain permission is merely semantical. That Mucha may have told his foreman that he was leaving his job to go on union business, rather than asked his permission to do so, seems to me to merely reflect mutual confidence that the permission which had almost invariably been granted would continue to be granted. Moreover, under the law, the Respondent was required to continue to grant such permission under the circumstances -- but only to the extent the Respondent had an established practice of doing so. And that established practice was for only half of Mucha's working day. It did

not entitle Mucha to suddenly begin devoting his entire working day to union business and be compensated by the Company for the additional time so spent. This would be true even if Mucha's sudden increase in union activity had been caused by a commensurate increase in need, which Mucha's testimony failed to show. As held above with regard to the Respondent's unlawful conduct toward Union President Krieg, such matters must be negotiated.

That the Respondent tolerated Mucha's expanded union-business activity for a few weeks did not establish a new practice of sufficient duration to prevent the Respondent from asserting its rights in the matter, and that is what its docking of his pay was designed to achieve. When Mucha revealed his determination to increase the time he was spending on union business the Respondent was entitled to refuse to compensate him for the time so spent over and above what it had compensated him for in the past.

Finally, the figures set forth above demonstrate that over the period covered by the complaint the Respondent not only fulfilled its obligation toward Mucha, it exceeded that obligation, by paying him for more than 50 per cent of the time he spent during working hours on union business.

Accordingly, I conclude that the Respondent did not violate Section 8(a)(3), (5) or (1) by threatening to dock or docking Mucha's pay. 27/

(2) BURNER STEWARD LONNIE PARRETT

Parrett has been burner steward for 3 years.

27/ See Charles H. Poindexter v. N.L.R.B. Northside Electric Company), 353 F. 2d 524 (C.A. 4); Stone & Sebster Engineering Corporation, 220 NLRB No. 124; Colunbus Coated Fabrics, Division of Borden Chemical, Borden, Inc., 202 NLRB 932; Russell Packing Company 133 NLRB 194; McCulloch Corporation, 132 NLRB 201. I have read with interest the cases brought to my attention in the General Counsel's brief, but I find them inopposite to the facts surrounding the docking of Mucha's pay. Thus, those cases involved unilateral changes in grievance procedures or other working conditions by employers more similar to the Respondent's conduct toward Krieg than toward Mucha, and the disciplining of employees and union stewards in retaliation against them for exercising their right to file grievances instead of for the pretextual reasons advanced.

He spend an average of 2 to 4 hours of his working day on union business away from his job as burner, for which time the Company compensated him. He was laid off in October and recalled in January 1975.

Parrett was reprimanded January 9, 1975, for loafing on the job. He gave the follwoing account of this matter: At about 7:05 a.m. Parrett told Forman Przystulsky he wished to investigate a complaint regarding "fume pay" at premium rates, and Przystulsky told him to report to his job and he could investigate the complaint after he "hooked up." Parrett saw no problem with that, and proceeded to his work place on the boat. About 7:20 another foreman named Dubosh arrived and asked Parrett why he had not hooked up yet. Parrett replied that there were no hoses on the boat and he would have to get a hose from supply, and told Dubosh that Przystulsky had said he could go on union business. Dubosh said to get hooked up first and then he could go. Parrett said he would,

got the hose from supply, and was connecting it up at 7:30 or 7:40 when Przystulsky arrived and told him again to get hooked up, and that Assistant Hull Superintendent Smith wanted to see him at breaktime. At breaktime, Parrett went to Smith's office where he found Smith, Dubosh, Mucha, and, he believed, Krieg. Smith issued Parrett the following disciplinary reprimand:

> Loafing. At approx. 7:15 this man had not yet picked up his necessary equipment as directed in order to perform his function as a burner. Was necessary to direct him to do so a second time. Was still engaged in hooking up up at 7:40 a.m.

Parrett was premitted to investigate the fume pay grievance at 11 o'clock that morning. 28/

28/ Although Parrett claimed he was denied the right to investigate this same grievance January 8, 1975, there is no supporting ptobative evidence to that effect.

Parrett filed a grievance requesting that the reprimand be rescinded, and Krieg subsequently advised Parrett that the reprimand was rescinded at the third step. 29/

29/ I do not credit Parrett's testimony that Przystulsky told him Dubosh complained to Smith about Parrett "going on union business again," even though Przystulsky and Dubosh did not testify. If Przystulsky had made such a remark, I am sure Parrett would have referred to it in the grievance he filed on the prepimand, which he did not do. The bases for Parrett's grievance were that Dubosh "did not make himself clear to Mr. Parrett"; that "Mr. Parrett was under the impression that all equipment was aboard the vessel"; and that Company rules state "it is not intended that men shall be penalized for honest mistakes." Moreover, I do not credit Parrett's testimony that Smith said during the second-step meeting on his grievance, in the presence of Krieg and Mucha, "that I was going to keep the reprimand because I asked to go on Union business too many times on January 9, 1975." Parrett did not in fact "keep the reprimand," and the meaning of the remainder of this supposed statement is not clear. Although Smith was not questioned about this alleged statement and therefore failed to deny it, by the same token Dirig and Mucha failed to corroborate it.

On January 17, 1975, Parrett wrote a grievance on the Company's refusal to pay him time and a half for union business during wash-up time on January 16; wrote a grievance on the January 16 discharge of employee Kingsley, 30/ and wrote two grievances on reprimands given to burners for abuse of breaktime on January 8 31/Parrett testified that Assistant Superintendent Smith

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29/ Parrett filed another grievance dated January 13, 1975, containing general allegations of discrimination because he was the steward of the burning department, and asking that he be treated "like every other employee." That grievance was answered the same day at the second step to the effect that the Company would "comply with relief sought. Supervisor will be informed."

30/ I do not credit Parrett's testimony that he was denied permission to see Kingsley's immediate supervisor on January 16. If he had been, he would have included it in either the Kingsley grievance or his own, but he did not include it in either.

31/ The contract time limit was extended by agreement regarding filing of grievances for these and other breaktime reprimands given out January 8.

told him he would be permitted to write the grievances at 3 P.M. but if he wrote them before that time he would have to go off the clock. Parrett then wrote a grievance on this docking, which amounted to 2-1/2 hours, for writing all five grievances before 3 P.M. on January 17,32/ Although Parrett was subsequently paid for the wash-up time spent on union business, the record does not reveal whether he was paid for the 2-1/2 hours January 17 dock.

On February 11, Foreman Przystulsky sent for Parrett and handed him the second-step answers to some greivances he had previously filed. Parrett began to read the answers when Przystulsky told him if he was going to do that at the time he would go off the clock.

32/ Although Smith admitted both Parrett and Lassen were docked on January 17, Smith seems to have telescoped the events of that day. See Lassen's testimony below about what happened to him.

On March 31, Parrett sought out Foreman Przystulsky and asked whether a grievance unrelated to these matters which he had previously filed was going to be honored by the Company. Foreman Przystulsky told Parrett "to get back on the job and he was giving me a direct order that I would be discharged if I didn't, and if he was wrong he would retract it later." Parrett returned to work under protest.

I find no violation in the postponement of Parrett's investigation of the fune-pay grievance on January 9. In my opinion, the reprimand he was given that day was not shown by credible evidence to be connected in any way with his request to investigate the grievance, but was based, unfairly as he may have viewed it, on a determination by supervision that it took him too long to hook up. Parrett conceded he saw no problem with being asked to do that job before he went on union business, and if he had done it with the dispatch required by supervision

he could well have been authorized to go on union business sooner. In any event, there is no indication that any disadvanrage resulted either to employees or Union by this incident.

However, the docking of Parrett's pay on January 17, the threat to dock his pay on February 11, and the threat to discharge him on March 31 were different matters. Parrett testified that on these occasions he was engaged in the kinds of union business which had been authorized and for which he had been compensated in the past, and I credit this testimony in the absence of any credible evidence to the contrary and because it is very probable in light of the entire record. Moreover, no evidence was offered to the effect that Parrett on these or any other occasions was spending or attempting to spend more paid time on union business than it was his established practice to do. I find that supervision was motivated, in this conduct toward Parrett, not by discriminatory

considerations, but by the same donsiderations which motivated it in its conduct toward Krieg and Mucha, as well as others in this proceeding to obtain more work from the Union representatives during working time.

As explained above, however, the Respondent was not entitled to change the grievance procedure unilaterally in this manner without affording opportunity for the Union to bargain concerning proposed changes. I conclude therefore that this conduct was violative of Section 8(a)(5) and (1) of the Act.

(3) WELDER STEWARD DAVID NOONAN and ALTERNATE WELDER STEWARD MYRON LASSEN

Noonan has been welder steward for a year and a half. He testified he spent 8 hours on union business some days, and 1 to 4 hours on other days. He was laid off from apparently, October until December 9, 1974. Lassen was welder steward 2 years, until the spring of 1974. Since then he has been alternate steward and acts as steward when Noonan is absent. As steward, he

spent an average of 4 hours a day, 20 hours a week on union business, at full pay. 33/

Lassen testified that on December 6, 1974, Superintendent Smith threatened, for the first time, to dock his pay. At 8:30 a.m., Lassen notified his immediate supervisor, Assistant Foreman Robert Rouse, he wished to take care of a grievance, and Rouse said O.K. Lassen left his job and went to the welding department lunchroom, where he wrote most of his grievances, and found Vice President Mucha there. When Lassen told Mucha he was there to write a grievance on holiday pay involving six employees, Mucha said

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33/ I do not rely on Foreman Stuller's testimony that historically Lassen spent 5 to 6 hours a day and longer on union business, more than Mucha, because I don't believe he had direct knowledge of the matter.

he had to write holiday-pay grievances involving five different departments. A total of 17 employees were involved. The two decided to write a single grievance without calling the 17 employees in individually, and began organizing their information to that end. Superintendent Smith came into the lunchroom and asked what they were doing. They explained. Smith told them both were not needed to write the grievance, and that Lassen could do so but Mucha would be docked if he remained. Smith returned 5 minutes later and told the two men, who were still in the lunchroom, that Mucha could stay and write the grievance but Lassen was not needed and would be docked if he stayed. When Smith left that time, Lassen returned to the lunchroom and resumed work on the holiday-pay grievance. Smith returned to the lunchroom for the third time and gave Lassen a direct order to return to work, as Smith had work for him to do. Upon consultation with Mucha, Lassen returned to work after protesting that he was in

the process of the grievance procedure. Lassen added, on cross-examination, that he was offered an alternate time to write the holiday-pay greivance, and that the contract deadline was never in jeopardy. He said that on a few occasions in the past Lassen and the superintendent had agreed on an alternate time for him to write grievances which happened only in emergencies. Lassen's pay was not docked on this occasion.

On December 10, 34/ after Noonan returned from layoff, he and Lassen requested a conference with Smith about Smith's conduct toward Mucha and Lassen on December 6. After some discussion,

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34/ Noonan and Lassen testified to this December 10 incident. Where their accounts differ, I rely on Noonan who seemed to recall the details better than Lassen.

Noonan asked if he could write a grievance on it, and Smith said, "If you wish." Noonan, Lassen, and Mucha then began talking over the grievance among themselves, and Smith asked who was writing it. When Noonan said Mucha was, Smith told Noonan to return to his job as "I don't need three welders sitting here on one grievance." It was Lassen who then wrote the grievance on the December 10 incident. At the second step on January 7, the Company answered that a mistake had been made because of rigid production schedules and apologized, and Plant Manager Plott told Noonan it would not happen again.

The one time Lassen claimed that his pay was docked was January 17. Sometime that morning two employees asked Lassen to write a grievance because htey had received reprimands. At about 8:40 a.m., Lassen told Foreman Rouse he wished to do so. When Rouse said he would let Lassen know about it, Lassen asked to see Assistant Superintendent Smith. The two of them went to Smith's office, and Lassen repeated his request. Smith responded he did not think Lassen needed to go

"at this time." Lassen summoned Mucha who was in the lunchroom nearby, and told him he wanted Mucha to hear Smith deny him the right to follow the grievance procedure. At that, Smith said he was not refusing permission but if Lassen went he would be docked. Lassen departed for the work area of the two employee complaintants. After satisfying himself that the work on which they were engaged was not of an emergency nature, he asked their foreman, Roger Knight, to release them so they could follow the grievance procedure. Knight refused to release them for the stated reason that he had work for them to do. Lassen went to Knight's superior, Welding Foreman Joseph Stuller. But Stuller told him the Union was not going to tell the Company when grievances would be written the Company is going to tell the Union, and Lassen was not going to write the grievance at that time; he would be permitted to do so at 3 p.m. After protesting that it would not give him enough time, Lassen went on to other union business for which the Company paid

him. The employees were not released at 3 o'clock, Lassen testified, and Lassen's pay was docked 2-1/2 hours. Lassen and Noonan filed a grievance, and the Company withdrew its position at the third step. 35/

Noonan was docked twice, in mid-January, and on February 5.

On January 21 or 22, Noonan wrote some ten grievances on excessive coffee-break reprimands. Failing to get employee signature on all of them that day. Noonan asked Superintendent Smith the following day if he could get the remaining signa-

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35/ Stuller did not testify about this particular incident, although he remembered that he once told Lassen to write a grievance at 3 p.m.

tures. Smith told him he could go, but he would be off the clock. Noonan went and was docked one half hour. 36/

With regard to February 5, Noonan testified as follows: After obtaining permission to investigate a problem regarding welders' premium pay fir dirty work, Noonan's verbal grievance was denied by the foreman concerned. He then told his own foreman, Rouse, he was going to prepare a written grievance on the issue. Rouse told Noonan he had 5 days within which to write the grievance. Noonan suggested he write it after lunch then, and Rouse said he would see. After lunch, Rouse told Noonan he could write the grievance but he would be docked. Noonan protested it was raining and he could not work anyway. Noonan was docked one half hour for writing the grievance, but was paid for the time spent obtaining the grievants' signatures on it. The next day Noonan asked Assistant Superintendent Smith to reconsider the dock but he refused,

because, he testified, the forman reported that Noonan was paid for the time spent investigating and getting signatures, he had 5 days to write the grievance, and his foreman needed Noonan on the job. Noonan filed a grievance on the dock of one half hour. The record does not show the eventual outcome of this grievance.

I find, based on the testimony of Noonan and Lassen which is credited in this respect in the absence of any probative evidence to the contrary, that they were engaged on the above-described occasions in the kind of union business for which they had been compensated in the past. Moreover, there is no evidence they spent more time on such business than it was their established practice to spend. I therefore conclude that by threatening to dock Lassen's pay on December 10 and refusing to release grievants' at Lassen's request on January 17, and by docking the pay of Lassen on January 17 and of Noonan for one half hour on January 22 and for one half hour on February 5, the Respondent unilaterally

changed the grievance procedure in violation of Section 8(a)(5) and (1).

E. UNION OFFICE

The complaint alleges unilateral action in violation of Section 8(a)(5) and (1) in requiring the relocation of the union office, removing the telephone, and changing the locks. 37/

More than 20 years ago the Union requested, and the Respondent granted, office space on Company premises for the use of all unions because the work force was expanding and a check-off provision had been incorporated in the collective-

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37/ Much of the testimony on this issue is mutually consistent. Where accounts vary, I rely on Vice Preisdent Schermond and Industrial Relations Manager O' Keefe based on their greater accuracy and truthfulness and on the probabilities in the light of the entire record.

bargaining agreement. A telephone was installed, with the number listed in the yard directory, and the same office was at the disposal of the unions free of rent for over 20 years. It was located in the Company employment-office building which has entrances directly from both the shipyard and the street. The union office is off the lobby which is frequented by job applicants, hirees, employees seeking information from the Company about fringe benefits, longshoremen making claims, and persons having business with the industrial relations director and corporate officers.

The other unions have rarely used the office, and were not issued keys to it. Before Harvey Krieg became president of the Union, the office was used primarily by Union financial secretaries before and after work, during the lunch hour, and on Saturday mornings to sign up new members and conduct business related to the checkoff and collection of dues. The Union presidents were seldom there during working time, and employees practically never.

When Krieg became president, he received keys to both the union office and the employment building. He reorganized the Union's files; and he kept letters, grievance forms, books on labor statutes, typewriters, and a copy machine in the office. As his activities increased, he used the office more and more and employees began to go there more and more during working hours. For the last 2 years Krieg used the office any time he wished, apparently as a fulltime base of operations, researching grievances, discussing matters with stewards, and writing grievances. After the credit union was established in 1973, it shared the office with the Union.

In the spring of 1974, Vice President Schermond decided that the Union and the credit union should vacate the office and that the Company would use it for a storage area. He told Krieg the Union and the credit union would have to get out. Krieg asked whether another location would be provided for the union, and the two of them walked to another site, located inside the yard, and

Schmond offered it to the union. Krieg rejected the offer, however, and askef for another location with an entrance from the street and suggested the second floor of the employment building. Schermond said no to this on the ground that there was no springler system there. Schermond showed Krieg a second location in the yard but said it could be used only before and after work and during the lunch hour, by union secretaries for the check-off system and not by other officers, as had been done in the past. Krieg rejected this location also, because it had no street entrance with access for the Union's non-employee members, and because he would not be allowed to get materials needed during the day.

About 2 weeks later, on June 6, Schermond and Personnel Director Dibble met with International Representative Sepelak, Krieg, and Mucha to discuss the matter. Schermond said the office was being abused by the number of employees going there and the amount of time spent there, and complaints had been received from management and other unions about. The matter was not resolved.

Four months later, on October 7, Schermond and Dibble again notified Krieg that the Union would have to vacate the office and suggested still another location. After Mucha observed and reported to Krieg that a schedule of the new non-worktime hours was posted at the proposed new location, Krieg found the suggestion "untenable," and refused to move. President Tietjen notified all unions by memo dated October 21 that the office should be vacated by October 28, and that a new facility was available "on a limited schedule other than normal working hours." The Union refused to vacate, and about October 15 or 16 the telephone was taken out; on October 22 or 23 the locks were changed on the employment building; and at the end of October the locks were changed on the Union office itself.

The union filed grievances October 25 and November 7, which were denied at the second step. At a third-step meeting held on March 20, 1975, Industrial Relations Manager O'Keefe asked why the Union did not like the yard location which

had been offered, and was told by Union officials it had no street entrance for the Union's outside members to pay dues and because the Company was setting limited hours for its use. O'Keefe had put the sign up listing the limited hours on that location. Although he never said the office could not be used during working hours, he did say permission had to be obtained if the Union expected the Company to pay. At a subsequent meeting, held March 24, O'Keefe offered the space on the second floor of the employment building with a separate entrance from the street which Krieg had originally suggested. The Company had refurbished the office, which was near the credit union's new location. O'Keefe specified that permission would have to obtained to use the office during working hours. Union officials looked at the new site March 31, but insisted on using it any time they wanted. This office is still available to the Union. It has not been accepted, Krieg still using the old office but only

after getting the key from the director of security.

The reasons given by Vice President Schermond and Industrial Relations Manager O'Keefe for desiring changes in the union-office set up (obtain storage space and reduce traffic in the employment-building lobby, as well as reduce or eliminate working time spent by employees and Union representatives in the Union office as had been the prior practice) are credited in the absence of any hint to the contrary, and are found to be legitimate business, and not discriminatory, reasons.

The location and the use of the office by Krieg and other employees diring working hours, established by practice, could not be unilaterally changed by the Respondent. But the changes were not unilaterally made. On the contrary, the Respondent served notice on the Union in the spring of its intent to make the changes. Two meetings were held, during which the respondent's reasons were explained and alternate sites were offered,

and several months elapsed before action was taken. After grievances were filed, at least two meetings were held at the last of which the Respondent accepted the only counterproposal made by the Union by offering the space originally requested. The Union continues to refuse all offers of new locations including that originally counterproposed by it. The grounds stated are the restriction on use during working hours, but the Union has naver made any counterproposal on this issue. I find, therefore, that the Respondent fulfilled its obligation to bargain, and was entitled to make the changes proposed. Accordingly, I conclude that no violation of Sec tion 8(a)(5) or (1) occurred and recommend that this allegation of the complaint be dismissed. 38/

38/ See Medicenter, Mid-South Hospital, 221 NLRB No. 105. Cf. Howmet Corporation, Austenal Microcast Division, supra; Granite City Steel Company, supra.

F. DICTAPHONE

The complaint alleges bad-faith bargaining with the objective of frustrating the grievance procedure in violation of Section 8(a)(5) and (1), by unilaterally insisting on using a dictaphone on third-step greivenac meetings contrary to past practice over the objection of the union, from October 15, 1974, through February 19, 1975, and refusing to hold third-step grievance meetings without using a dictaphone. 39/

On October 14, 1974, Joseph Danny O'Keefe was appointed manager of industrial relations by the Respondent. An employee of 13 years, O'Keefe had been the Respondent's director of safety and security. Before that, O'Keefe had been an electrician, a member of IBEW Local 1844, of which he

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39/ The relevant facts respecting this issue are based on an emalgam of the testimony of all witnesses judged on their relative credibility and the probabilities.

was a steward for 2 years, and president from 1965 through 1971 in which capacity he was a member of that local's negotiating team and attended third-step grievance meetings.

On the morning of O'Keefe's appointment, 40/ Vice President of Personnel Robert Dibble gave O'Keefe the files on 28 grievances which were scheduled for consideration at a third-step meeting the next day, October 15, and told O'Keefe that all participants had been notified of the meeting. After being unable to reach Union President Krieg, O'Keefe got in touch with Vice President Mucha and told him he had just received the files. O'Keefe requested that the inter-

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40/ O'Keefe was asked 5 or 6 weeks before October 14 if he was interested in the position and he said yes, but he was not told in advance when the job was to be his.

national representative, Krieg, and Mucha meet with him half an hour before the third-step meeting to go over the grievances as well as a change in seating arrangements and a dictaphone set up O'Keefe would like to use. International Representative Philip Bartley, Kreig, and Mucha met with O'Keefe the next day as requested. During the conference, O'Keefe informed the Union Officials he would like to use the dictaphone in order to facilitate his meeting the 3-day contract deadline for answering third-step grievances. The Union officials took the matter under advisement, and at the opening of the scheduled meeting objected to the use of a dictaphone for the stated reasons that their witnesses might be reluctant to testify, the tapes could be erased and changed, and such tapes might be used against the Union in arbitration proceedings. O'Keefe said he wished to use the dictaphone only for third-step meetings and promised not to use the tapes in arbitration proceedings, and offered to provide tapes or transcripts upon request.

The Union refused these offers, as well as O'Keefe's alternate suggestion that a stenographer be called in to take minutes. O'Keefe then asked that the Union's objectiions be noted and the meeting begin, using the dictaphone and the Company giving the Union a copy of the tape or a transcript. The Union cancelled the meeting, however, announcing that it would not meet if a dictaphone was used.

Immediately after that meeting broke up, O'Keefe met separately at Mucha's request with Mucha, Krieg, and Bartley. Krieg's discharge was discussed, and O'Keefe showed the dictaphone to the Union officials and explained its operation. Thereafter, the Union cancelled the third-step meeting scheduled for the following day, October 16.

On October 17, 1974, Union President Krieg filed the unfair labor practice charge upon which this issue is based. O'Keefe telephoned

International Representative Sepelak that day. In that and a subsequent telephone conversation, Sepelak reiterated that the Union would not meet with the dictaphone. He asked the Company to hold all third-step greivances in abeyance and not penalize the Union for failure to meet within 5 days of the second-step meeting as provided in the contract, and the two of them agreed to meet to discuss the matter further October 24.

On October 24, Sepelak presented O'Keefe with a letter dated October 23 to the following effect:

> In reference to our telephone conversation on Oc. 22, 1974, the International requested that all 3rd step Grievances that were to be discussed on Oct. 15, 1974 and any future Grievances that go into 3rd step be put into abeyance until the issue is resolved concerning the Company using a dictaphone at the 3rd step Grievance meetings.

As we agreed, the 5 day limitation as outlined in the 3rd step Grievance Procedure will be waived by the Company.

No progress was made at this meeting.

On November 1, 1974, O'Keefe addressed the following letter to Sepelak:

In reference to your letter of October 23, 1974, and the meeting held October 24, 1974, concerning the company using a dictaphone in the grievance procedure. The company's position is firm in regarding the dictaphone, and we cannot abide by your request. We will continue to schedule grievances by our normal procedure and use the dictaphone as we feel it is not in violation of any agreement.

The company will furnish the Union with a copy of the transcript, if they so desire. 41/

41/ The General Counsel's witnesses testified that O'Keefe demanded that the Union pay for copies of tapes or transcripts requested. I am inclined to

No third-step meetings were held until March 19, 1975 on grievances filed by employees represented by the Union. All third-step grievances were held in abeyance during that period and the contract time limit was waived by the Respondent.

After failing in several attempts to contact Sepelak, O'Keefe met with Sepelak, Krieg, and Mucha on January 16 to discuss 58 excessive-coffee-break reprimands which had been issued January 8. After that issue was discussed at length, the use of the dictaphone was brough up again, O'Keefe offering to drop the dictaphone issue of Union would drop the unfair labor practices charges, but Sepelak elected to await a decison by the NLRB on whether to issue a complaint.

41/ discount this because such testimony was not in harmony and no reference to such a demand appears in O'Keefe testimony or in his November 1 letter to Sepelak. In any event, the cost of such copies was not given by any of the Union officials as a reason for their objection to the use of a dictaphone. Cf. N.L.R.B. v. Southern Transport, Inc., 355 F. 2d 978 (C.A.8)

On February 18, O'Keefe informed the General Counsel he had withdrawn his position on the dictaphone because his staff had become familiar with grievance procedure and he no longer had any need for it, 42/and the information was conveyed to the NLRB Regional Office in a letter from the Respondent's attorney dated February 20, 1975. The complaint incorporating this allegation was issued June 12, 1975. As indicated, third-step meetings were resumed, without a recording device, March 19.

There is no doubt that O'Keefe was firm in his insistence on using a dictaphone to record third-step greivance meetings from the time he became industrial relations director. No persuasive argument has been advanced, however, to

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42/ O'Keefe testified he had told the Carpenters' president, at a meeting with that Union on February 13, "Very probably, Bob, we won't need a tape recorder, but I still feel I have a right and there is a charge on us, and if we didn't use it, would we be admitting that we were guilty as charged?"

support the General Counsel's contention that O'Keefe took the position he did in bad faith. Thus there is no idication that there was any relationship between the timing of Krieg's unlawful discharge in which O'Keefe was not involved, and O'Keefe's appointment as industrial relations manager 3 days later, or any relationship between any of the unfair labor practices found and O'Keefe's motive in insisting on using a dictaphone at third-step greivance meetings. Moreover, it is clear that his appointment to the position of industricl relations manager occurred only the day before a third-step meeting was scheduled, that the greivances to be considered at that meeting were numerous and thereafter increased in number. It is therefore reasonable to believe that his objective was to expedite, and not to delay, the processing of greivances, as he testified. Further, O'Keefe did not call off the third-step meetings over the issue and when the Union refused to meet with the dictaphone, O'Keefe agreed not to attempt to invoke the

contract penalty of forfeiture. No doubt the Union's reasons for objecting to the use of a recording device seemed equally valid to its officials. Speaking of this kind of dispute, the Board has said, 43/

> It is wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods of compromise and accommodations as are used in resolving equally difficult differences relating to substantive terms and conditions of employment. In neither case will we presume to pass upon which is the preferable position or to dictate terms of

43/ St. Louis Typographical Union No. 8, affiliated with International Typographical Union, AFL-CIO (Union Employers' Section of the Graphic Arts Association of St. Louis, Inc.), 149 NLRB 750.

an agr-ement, but will, rather, concern ourselves only with whether the parties are acting in good faith.

In the aforesaid circumstances and in the context of this entire case, I find that the Respondent did not act in bad faith by insisting on the use of a dictaphone in third-step greivance meetings for the purpose of avoiding, delaying, or frustrating the greivance procedure, and I conclude that this allegation should be dismissed.44/

G. ALLEGEDLY ANSWERED GRIEVANCES

The complaint alleges that the REspondent violated Section 8(a)(5) and (1) by determining

44/ See Inter-Polymer Industries, Inc., 196 NLRB 729, 762. Cf. West Coast Casket Company, Inc., 192 NLRB 624, 638, enforced as modified 469 F. 2d 875 (C.A.9); Architectural Fiberglass-Division of Architectural Pottery, 165 NLRB 238 Southern Transport, Inc., 150 NLRB 305, enforcement denied 355 F. 2d 978 (C.A.8).

its answers to greivances before discussing them with the Union at the third-step meeting on April 23, 1975.

The testimony on this issue is not in substantial dispute. Union officials noticed that O'Keefe arrived at the third-step meeting April 23 with what appeared to be Company third-step answers already typed in the space provided on the forms. Krieg asked if O'Keefe replied that those were only his notes, that he was there to negotiate his answers; and if the Union had any information other than what O'Keefe replied that those were only his notes, that he was there to negotiate his answers; and if the Union had any information other than what I'Keefe had, he would consider it and could change the answers. At the hearing, O'Keefe explained that he customarily typed his notes himself. His answers to these particular grievances were eventually provided on separate sheets of paper which had seldom if ever been done before and was not done after that.

There is no evidence that the Respondent refused to hear the Union's evidence or arguments in support of these grievances, or that it in any other way failed to give them fair consideration.

I do not believe that the above facts justify the conclusion that O'Keefe intended to subvert or undermine the greivance procedure, or that his conduct on this occastion was motivated by bad faith. Accordingly, I conclude that this allegation is not supported by a preponderance of the evidence and recommend that it be dismissed.

IV. REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I recommend that it cease and desist therefrom and from any like or related unfair labor practices and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) by discharging Union President Harvey Krieg I recommend that it offer him immediate and unconditional reinstatement to his former job or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges; and to make him whole for any loss of pay suffered by him as a result of his discharge on October 11, 1974, in the manner described in F.W. Woolworth Co., 90 NLRB 289, with 6 percent interest as provided in Isis Plumbing & Heating Company, 138 NLRB 716. Having found that the Respondent violated Section 8(a)(5) and (1) by docking the pay of Lonnie Parrett and Myron La-sen on January 17, 1975, and of David Noonan on January 22 and February 5, 1975, I recommend that it make them whole, to the extent it has not already done so, for the loss of any pay suffered by them thereby in the manner, and with interest, described above.

I further recommend that the Respondent restore the wages, hours, and working conditons appertaining to the above-named Union representatives and stewards at the time of its unilateral changes, and if the Respondent still desires such changes, to bargain in good faith with the Union with respect thereto. 45/

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended: 46/

45/ See Granite City Steel Company, supra, 316-317, and cases cited therein. There is no dispute as to the appropriate unit.

46/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the finding,s conclusions, and recommended Order herin shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

American Ship Building Company, of Lorain, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing the wages, hours, or working conditions of its employee Union representatives or stewards established by practice, including discharging or threatening to discharge them, or docking or threatening to dock their pay in connection with or as a result of such unilateral changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Harvey Krieg immediate and unconditional reinstatement to his former job and make him, Lonnie Parrett, David Noonan, and Myron Lassen whole with interst in the manner described

in the Remedy section of this Decision.

(b) Restore the wages, hours, and working conditions and other terms and conditions of employment appertaining tot he above-named Union representatives and stewards at the time of the Respondent's unilateral changes.

(c) Upon request, bargain collectively in good faith with the certified joint representative, including International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 358, AFL-CIO of its employees in the appropriate production and maintenance unit concerning any changes in the wages, hours, working conditions, and other terms and conditions of the Union representatives and stewards of its employees established by practice.

(d) Preserve and upon request make available to the Board or its agents for examination and copying all timecards; payroll, social-security, and personnel records and reports; and all other records necessary to determine the amount

of backpay due under this Order.

(e) Post at its shipyard in Lorain, Ohio, copies of the attached notice. 47/ Copies of the notice on forms provided by the Director of Region 8 of the Board shall be signed by an authorized representative of the Respondent, posted by it immediately upon receipt thereof, and maintained for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

47/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Notify the Director of Region 8 in writing within 20 days from the date of this Decision what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C.

Almira A. Stevenson
Administrative Law Judge

Supreme Court, U. S.
FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

No. 78-27

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 358, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
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OPINIONS BELOW

The order of the court of appeals (Pet. App. 26-27) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 28-131) are reported at 226 NLRB 788.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1978. The petition for a writ of certiorari was filed on July 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that an employee was discharged because he refused to work and not because of anti-union animus.

2. Whether substantial evidence supports the Board's finding that the employee's practice of not working was not a condition of employment that could only be changed through collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 2-5

STATEMENT

1. Petitioner (herein "the Union") has been a party to collective bargaining agreements covering employees at the American Ship Building Company's Lorain, Ohio, shipyard since the early 1940's (Pet. App. 49). The Union's presidents, since approximately 1950, have been permitted to tend to union business during working time. Thus, traditionally the Union president would report to his supervisor at the beginning of his shift. When summoned for union business, he requested permission, which was invariably granted, to attend to such business. When necessary, the president would be required to finish the job at hand or wait until a replacement arrived before leaving his work. Typically, the Union president spent 1 to 4 compensated hours during work hours each day on union business (Pet. App. 53).

When Harvey Krieg became president of the Union in July 1972, he initially operated within the established practice (Pet. App. 53-54). However, Krieg gradually spent a greater and greater portion of his time on union business, until, by late 1972, he was spending all his time

on union business, and did not report to his foreman, William Van Horn, at the beginning of his shift (Pet. App. 54-55). On June 7, 1974, following complaints by Van Horn to his superior, the Company ordered Krieg to report to Van Horn at the start of his shift. Krieg did not comply with the order but filed a grievance, which had not been resolved at the time of his subsequent discharge (Pet. App. 55).

On October 11, 1974, Van Horn discovered that he was a man short, and needed Krieg to complete a four-man unloading crew. He found Krieg in the dispatcher's office reading a newspaper. Krieg told Van Horn that he wished to take up a grievance regarding the loading of a ship that had just left on a trial run (Pet. App. 55-56). Van Horn replied that the grievance could be taken up later, but that first Krieg would have to help the unloading crew. Krieg refused, stating that he was "involved in the grievance procedure" (Pet. App. 56-57). Van Horn sought the assistance of Vice President of Operations John Schermond, who supported Van Horn and ordered Krieg to obey his foreman. Krieg walked out on Schermond, who then directed Van Horn to issue Krieg a reprimand for insubordination, which, under Company rules, resulted in discharge (Pet. App. 57).

2. The Board found that the Company did not violate the Act by discharging Krieg. The Board agreed with its Administrative Law Judge that the record did not support the Union's allegation that Krieg had been discharged because of his strong advocacy on behalf of the Union. The Board noted that, while Krieg had been aggressive and successful as union president, there was "no evidence * * * that management built up any hostility towards Krieg or his union because of this" (Pet. App. 58). Indeed, the record showed that the Company had had an association with petitioner and other unions at the Lorain location for many years, and that "[o]ther than expressions

of disagreement and exasperation normally characteristic of the arms-length bargaining relationship there is no substantial probative evidence of any desire by the [company] to deprive its employees of representation by the Union or unions of their choice, * * * or of other anti-union animus" (Pet. App. 59-61). The Board therefore concluded that the Company did not violate Section 8(a)(3) of the Act because "the record fails to support the * * * contention that Krieg's discharge was motivated by anti-union considerations" (Pet. App. 58).

The Board, however, disagreed with the Administrative Law Judge's conclusion that the discharge violated Section 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. 158(a) (1) and 158(a)(5), because "Krieg's nonwork for 2 years with full knowledge of the Employer rose to the level of an existing working condition, established through custom and practice, which could not be changed without bargaining with the Union" (Pet. App. 30).[1] The Board noted that nothing in the collective bargaining agreement permitted Krieg to decline work assignments, and that there was no evidence that during the two year period he had ever been ordered to work or that the Company had assumed he would not work if so ordered. The Board stated that "[s]omething more affirmative is needed to establish that an employer has waived its right to require an employee to perform work for which he was hired and for which he was nominally being paid" (Pet. App. 31). Moreover, the Board concluded that the fact that, four months prior to the discharge, the Company had ordered Krieg to report to his foreman at the start of his shift (the normal practice for other employees) demonstrated that the Company "did not intend such a waiver" and that "Krieg was therefore on notice well before his discharge that he was expected to work when ordered to do so" (Pet. App. 31-32).

[1]The Board stated (Pet. App. 30-31): "By this logic, Respondent would have had to bargain with the Union for Krieg's services before ordering him to perform work for which he was being paid and before discharging him for failure to obey such an order."

The court of appeals affirmed the Board's order without opinion (Pet. App. 26-27).

ARGUMENT

1. The Union contends (Pet. 8-20) that the Board erred in finding that Krieg's discharge was not motivated by anti-union animus. That question raises only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491.

In any event, there is ample support in the record for the Board's decision. The Union relies primarily on Company Board Chairman Steinbrenner's alleged remark the preceding year that "[t]hose that cooperate with me, I cooperate with one hundred per cent and those that don't, I take care of" (Pet. 9-10). However, as the Law Judge noted (Pet. App. 59): "This statement was made, if at all, a long time ago in a discussion of an issue, apparently not thereafter pressed by the Company."[2]

[2]The Union also appears to contend (Pet. 14, 20) that Krieg's discharge violated Section 8(a)(1) because Krieg was allegedly entitled (presumably under the collective bargaining agreement) to refuse to work because he was allegedly processing a grievance. That contention is also belied by the record. The grievance did not require immediate attention since the ship at issue had left the yard and since, as the Board noted (Pet. App. 32), "under the contract the Union had 7 more days in which to press the grievance." Under the circumstances, therefore, Krieg had no right to refuse Van Horn's order to work and defer the grievance.

Petitioner's reliance (Pet. 20) on *Southwest Latex Corp.* v. *National Labor Relations Board,* 426 F. 2d 50 (C.A. 5), for the proposition that discharge of an employee "engaged in protected activity at the time of his discharge" is *a fortiori* unlawful is without merit. That case, in which the court of appeals denied a Board request for enforcement of a decision finding an unlawful discharge, simply stated that to find illegality "it must be shown that the employer knew that the employee was engaged in protected activity and that the employer fired the employee because of such activities." *Id.* at 56. Here, of course, the Board found that Krieg's protected activity in no way motivated his discharge.

2. The Union also argues (Pet. 21) that Krieg's self-appointed status as a nonworking employee had become a condition of employment that could only be changed by bargaining. That claim is insubstantial. As the Board noted (Pet. App. 34 n. 2):

> [T]he custom and practice in existence for some 20 years prior to Krieg's ascendancy to the presidency was for employee union presidents to spend only half their day on union affairs and the other half working. Krieg's encroachment upon this deeply rooted practice cannot eliminate what had existed for 20 years.

Moreover, that fact that Krieg was expressly directed to work four months before his discharge refutes the suggestion that the employer had accepted his nonwork practice as a condition of employment. The Board's finding is thus amply supported by the record and does not, in any event, warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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